IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 23, 2007 Session

IN RE ADOPTION OF W.J.P.

Appeal from the Chancery Court for Monroe County
No. 15248 Jerri Bryant, Chancellor

No. E2007-01043-COA-R3-PT - FILED JANUARY 30, 2008

This is an appeal as of right in a parental rights termination case. We hold that the evidence in the record does not preponderate against the trial court's conclusion that the evidence fails to establish by clear and convincing proof that statutory grounds exist to terminate the father's parental rights or that the child would be exposed to a substantial risk of harm if placed in the father's care. We therefore affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Theodore R. Kern, Knoxville, Tennessee, for the appellants, A.L.M. and R.L.M.

Kevin C. Angel, Clinton, Tennessee, for the appellee, M.J.T.

OPINION

I.

In September 2005, at the age of sixteen, V.E.P. ("Mother") learned that she was pregnant. She immediately told M.J.T. ("Father") that she was carrying his child. Father never questioned whether he was the biological father of the child. He accompanied Mother to the county health department for an appointment to confirm the pregnancy. Father also went with Mother to three or four of her doctor's visits prior to the child's birth.

Mother first discussed with Father placing her child up for adoption in January 2006. Two months later, she informed Father that she had definitely decided to place the baby with an adoption service. On March 24, 2006, after hiring legal counsel, Father filed a "Notice of Intent to Claim Paternity or Acknowledgment of Paternity of a Child Born Out-of-Wedlock" with the State of

Tennessee, Department of Children's Services ("DCS"). On March 29, 2006, Father received a letter from Bethany Christian Services of East Tennessee ("Bethany"), advising him that Mother had contacted the agency about placing her child up for adoption. The letter indicated that Mother had identified M.J.T. as the child's father and specifically advised him to contact an attorney if he intended to assert parental rights to the child. Melanie Barrett, an employee of Bethany, contacted Father by telephone on March 31, 2006. During the phone conversation, Father informed Ms. Barrett that he did not support the adoption decision.

The child at issue, W.J.P., was born on April 21, 2006, in Anderson County, Tennessee. Five days after his birth, Mother informed Father that she had given birth to his son. Mother subsequently surrendered W.J.P. to Bethany on April 27, 2006; on that same date, in Blount County Circuit Court, Bethany obtained an order of partial guardianship over the child. Bethany immediately placed W.J.P. with A.L.M. and R.L.M. ("Adoptive Parents"), residents of Monroe County, Tennessee. The couple had previously been selected by Mother. Father received a second letter from Bethany on May 1, 2006, advising him of W.J.P.'s birth.

On May 18, 2006, Father filed a Petition for Order of Parentage and Immediate Custody of W.J.P. in Anderson County Juvenile Court. After finding that the child was without a proper guardian and that the superior rights of the putative biological father were being violated or ignored, the juvenile court issued a bench order on May 31, 2006, placing W.J.P. in the custody of DCS. On July 3, 2006, Adoptive Parents, together with Bethany, petitioned to terminate Father's parental rights in Monroe County Chancery Court. Because W.J.P. was still in the legal custody of DCS at this time, Adoptive Parents included DCS as a defendant in their petition. On August 2, 2006, DCS filed an answer to the petition, asserting that there was no basis for DCS to be involved as a party and that the agency should be dismissed from the case and relieved of legal custody of the child.

On September 28, 2006, the juvenile court issued an order requiring the immediate transfer of custody for W.J.P. from Adoptive Parents to Father. In its order, the juvenile court indicated that "Bethany Christian Services was attempting to require [Father] to surrender his parental rights when he had no desire to do so and further, that Bethany Christian Services had placed the child with nonrelatives despite [Father's] request of them for custody of the minor child." The juvenile court specifically found that "Bethany Christian Services and the adoptive parents, although not parties to the Permanency Plan, have taken steps to thwart visitation between the child and his father in an effort to strengthen the proposed termination of [Father's] parental rights and subsequent adoption of this child by the prospective adoptive parents." The juvenile court noted that DCS had reported that Father "has complied in every way with the requirements of DCS including parenting classes, random drug screens, employment, housing and training with Healthy Starts." The court also observed that the DCS representative had "opined that placement of the child in the home of the father would not place the child in any risk of harm and that there was no reason that the child should not [be] placed in the home with the father based upon the history of visitation, home studies and classes taken by the father through Healthy Starts for infant care." The juvenile court determined that "placement of the child with the proposed adoptive parents, although in the discretion of DCS, is not found to be proper by this Court as it is allowing this child to continue to foster a bond with

another family instead of his own family, that has expressed the ability and willingness to take the child."

On September 29, 2006, Adoptive Parents filed an emergency motion to stay the order of the juvenile court, on the grounds that the juvenile court had lost jurisdiction over W.J.P. when the adoption petition was filed in Monroe County. The trial court granted this motion by *ex parte* order on the day that it was filed. At the same time, the trial court appointed a guardian *ad litem* for W.J.P. On October 10, 2006, DCS was dismissed as a party in this proceeding and took no part in the trial. On November 1, 2006, the trial court approved an agreed order finding Father to be W.J.P.'s biological father.

A bench trial was held on February 21, 2007, limited to the issue of whether statutory grounds existed for termination of Father's parental rights. The trial court heard conflicting testimony from Father, Mother's guardian ("M.W.V."), and Mother about whether Father ever offered any financial help for the pregnancy to Mother or M.W.V. Father indicated that he had attempted to give M.W.V. money, but that the guardian claimed it was not enough cash for the co-payment and refused to accept it. Father noted that he also obtained some checks to pay M.W.V., but that M.W.V. insisted upon cash. Father testified that he did not discuss payments with the physician's office because Mother was covered under the guardian's insurance and M.W.V. had instructed him not to interfere. Father admitted that he never made any payments to the doctor's office. Father stated that he bought Mother a couple of shirts and pants and fed her when she came after school to the house where he lived with his grandparents. He claimed that Mother spent 75% of her time at his residence. Father admitted that he never gave Mother money directly and never paid any expenses related to W.J.P. Ms. Barrett at Bethany testified that Father never sent any money to the agency for W.J.P.'s support. She noted that Father contacted her on May 8, 2007, and inquired about revocation of the adoption. She informed him at that time that she could not discuss anything with him because of client confidentiality. Ms. Barrett admitted that none of the correspondence or conversations with Father advised him that he should send money to the agency for W.J.P.'s support. Father testified that he would be willing to pay part of the expenses regarding the care of his child.

Father acknowledged being employed at various places during Mother's pregnancy. His jobs included: working for two months at Wilson's Wrought Iron, where he earned $8 or $8.50 per hour, at least 20 hours per week; Bull Run Metal Fabrication, where he worked full-time for three or four months at $9.50 or $10 per hour; KAG plumbing, where he worked for two or three weeks; and Southland's Contractors, where he worked off and on for five or six months, earning $10 per hour.

Father stated that he lived with his grandparents, where he assisted with the care of his disabled grandfather. He did not pay rent or make any contribution toward payment of the utilities, but helped around the house to earn his keep. He was not making payment on any medical or credit card bills. He purchased a car for $1,000 from his uncle, to whom he paid $25 per week. Father stated that the car payment was the only bill for which he took responsibility either during or after Mother's pregnancy.

Father testified that DCS had arranged a few visits with W.J.P. for him while the child was in the agency's custody. Father indicated that he never set up any visitation himself because he did not know that he could arrange it without permission. He claimed that he did not contact Adoptive Parents about W.J.P. or try to set up visitation through them because he had been told to not call Adoptive Parents. He never spoke with anyone from Bethany about setting up visitation with W.J.P. With the exception of the night of September 28, 2006, following the Anderson County Juvenile Court's order transferring custody of the child to him, Father never had physical custody of W.J.P. until the conclusion of trial on February 21, 2007.

M.W.V. claimed that Father asserted to him that he had no money with which to assist with Mother's expenses. The guardian claimed that Father never offered to contribute. Father noted that M.W.V. did not like him because Mother's guardian believed that Father was mixed race. Father claimed that M.W.V. said that he did not want a "n _ _ _ _ _ grandbaby." According to Father, M.W.V. used racial slurs in Father's presence.

On October 24, 2006, Father provided a sample of body hair for a hair follicle drug test. Body hair was taken for the sample, rather than head hair, because Father's hair on his head was too short to obtain a sample. Father's test results were positive for methamphetamine and cocaine. Based on this test, the time period during which Father used these drugs could not be identified more closely than during the twelve months prior to providing the sample.

Father admitted that he was drug tested repeatedly from May through September 2006, with the following results: May 31, 2006, positive for illegal drugs; July 12, 2006, positive for THC (marijuana); July 25, 2006, positive for opiates; August 25, 2006, positive for cocaine; September 22, 2006, positive for amphetamines, methamphetamines, and morphine or opiates. At the time of the trial, Father testified that he was not using drugs. He claimed that on some of the tests showing positive results, he took another test which came back negative. He stated that he knew for a fact that he should not have tested positive on some of the tests. Father testified that he had attempted to obtain admission to a drug rehab program through Parkwest Hospital. He claimed that he had been rejected because he had no drugs in his system at the time.

Mother testified that she and Father used Oxycontin, cocaine, and marijuana together prior to her pregnancy. According to Mother, she abstained from drug usage during her pregnancy, but resumed using Oxycontin and marijuana with Father after the child's birth. She admitted to also using methamphetamine at least once with Father after her pregnancy.

Mother admitted that Father would pay for all her food when they went out to eat. She acknowledged that Father wanted to be with her while she was pregnant and that he had wanted them to live together and care for their child. She indicated that she had given the child over to Bethany before she even notified Father of his son's birth and further admitted that she would do anything to help Adoptive Parents get custody of W.J.P. Mother stated that her guardian referred to Father as a "n _ _ _ _ _" and had referred to the baby as a "half-breed."

Mother further testified that both during and after her pregnancy, on a number of occasions, Father would threaten to hit her but would hit beside her head instead. According to Mother, on at least one occasion, Father threatened to "do a Lacy Peterson" on her. Mother portrayed Father as always being angry. At the time of trial, M.W.V. had obtained an Order of Protection against Father, based on the contention that Father had attempted a forced entry in order to see Mother.

Father's aunt testified that Father gave her money out of his paychecks to hold for the benefit of the child and the related expenses. She instructed him to not give cash or checks directly to Mother without copies of the bills. The aunt claimed that she requested copies of the bills from Mother, but never received any documentation. She testified that she left messages with the guardian to call her, but he never returned her calls. The aunt noted that she also sent M.W.V. a letter requesting that he contact her, but he did not respond. According to the aunt, Father's family had prepared a nursery for the child and Father has an extensive family willing to help care for W.J.P. She indicated that she had accompanied Father when he sought drug treatment. The aunt stated that Father was rejected for admission when no drugs were found in his system. She claimed that Father had taken drug tests for several jobs on which he received negative results.

Father's mother testified that she had attempted to talk with the guardian and that M.W.V. had referred to her son by using racial slurs, called her and her family "n _ _ _ _ _ lovers," and informed her that he did not want to "raise a 'n _ _ _ _ _ baby' in his home." She stated that her son offered to help with Mother's expenses, but that Mother would tell them that her guardian "won't accept checks or anything else. He wants cash money." She recalled that when her son sought drug treatment, the hospital staff rejected him for admission because of the lack of drug usage.

Immediately upon the conclusion of closing arguments, the trial judge issued oral findings of fact and conclusions of law, in which she determined that the petition for termination of Father's parental rights should be dismissed.

The written findings of fact and conclusions of law of the trial court were filed on April 20, 2007. The trial court made, *inter alia*, the following significant findings of fact: Bethany knew that Father disagreed with the adoption plan; the order of partial guardianship was entered without any showing of notice to Father; Bethany had actual notice of Father's claim of paternity before W.J.P.'s birth; the juvenile court's findings relate that there was probable cause to believe that Father's parental rights were violated; Mother spent much time with Father and he and his family provided her with meals and clothes; Father went to at least a few of Mother's appointments; Father attempted to provide money for doctor's visits, but his offers were refused because he did not tender cash; Father admits that he has been involved with drugs; Father enjoys the support of family; it has not been shown that Father can't parent or that he exposes the child to a risk of harm; Father has not been given the opportunity to parent; it is not unreasonable to ask to have paternity established before voluntarily paying child support; and Father is uneducated with regard to legal matters.

The trial court concluded that "[t]here is insufficient evidence to indicate [Father] poses a substantial risk of harm to the child if it is placed in his legal and physical custody." The petition for adoption was dismissed. A timely appeal was filed by Adoptive Parents.

II.

The issues presented on appeal are as follows:

> 1. Whether the trial court erred by failing to rule on Appellants' claim that grounds existed for termination of Father's parental rights with respect to W.J.P. due to Father's failure to take steps to assert paternity within 30 days after notice of his alleged paternity by the child's Mother. Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi).
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> 2. Whether the trial court erred by failing to rule that grounds existed for termination of Father's parental rights with respect to W.J.P. because placing W.J.P. in the legal and physical custody of Father posed a risk of substantial harm to the physical or psychological welfare of the child. Tenn. Code Ann. § 36-1-113(g)(9)(A)(v).
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> 3. Whether the trial court erred by failing to rule that grounds existed for termination of Father's parental rights with respect to W.J.P. because Father failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with Tennessee's child support guidelines. Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii).
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> 4. Whether the trial court erred by failing to rule that grounds existed for termination of Father's parental rights with respect to W.J.P. because Father failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child promptly upon receipt of notice of the child's impending birth. Tenn. Code Ann. § 36-1-113(g)(9)(A)(i).
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> 5. Whether the trial court erred by failing to rule that grounds existed for termination of Father's parental rights with respect to W.J.P. because Father failed to seek reasonable visitation with the child, and failed to visit altogether or engaged only in token visitation as defined by Tenn. Code Ann. § 36-1-102(1)(C). Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii).
>
> 6. Whether the trial court erred by failing to rule that grounds existed for termination of Father's parental rights with respect to W.J.P.

> because Father failed to make reasonable payments toward the support of the child's mother during the four months immediately preceding the child's birth. Tenn. Code Ann. § 36-1-113(g)(1).

III.

In reviewing the trial court's determination in this case, this court must first review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Each of the trial court's specific factual findings should be presumed to be correct unless the evidence preponderates otherwise. Second, the court must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights. ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002). Thus, giving appropriate deference to the trial judge's determinations of credibility, the trial court's findings are fact are presumed correct, unless the evidence preponderates otherwise. ***In re M.J.B.***, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004).

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972)***; O'Daniel v. Messier***, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d at 652-53. "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 103 (1996) (*quoting* ***Santosky v. Kramer***, 455 U.S. 745, 787 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***Blair v. Badenhope***, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Drinnon***, 776 S.W.2d at 97. Tenn. Code Ann. § 36-1-113 (Supp. 2007) governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c).

IV.

A.

The threshold issue in every termination case is whether the parent whose rights are at stake has engaged in conduct that constitutes one of the grounds for termination of parental rights.

Adoptive Parents rely primarily on provisions of Tenn. Code Ann. § 36-1-113(g)(9)(A), which more fully provides as follows:

> The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person . . . is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:
>
> (i) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;
>
> (ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;
>
> (iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102(1)(C);
>
> (iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;
>
> (v) Placing custody of a child in the person's legal and physical custody would post a risk of substantial harm to the physical or psychological welfare of the child; or
>
> (vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3) . . . .

Adoptive Parents note that this statute was amended in 2003 to clarify that it applies to a person who, at the time the petition is filed, is not the legal parent of the child. ***In re D.A.H.***, 142 S.W.3d 267, 276 (Tenn. 2004). The term "legal parent"

> includes a child's biological mother, the biological mother's husband under certain circumstances, or an adoptive parent. It also includes

> the child's biological father if he "has been adjudicated to be the legal father of a child by any court or administrative body of this state or any other state or territory or foreign country." Tenn. Code Ann. § 36-1-102(28)(D).

In re Adoption of S.M.F., No. M2004-00876-COA-R9-PT, 2004 WL 2804892, at *6 (Tenn. Ct. App. M.S., filed December 6, 2004). Adoptive Parents claim that Father was not adjudicated to be the father of W.J.P. until November 1, 2006, four months after the petition for termination was filed.

A father who executes an acknowledgment of paternity prior to a termination of parental rights proceeding establishes a "legal relationship" between himself and the child, making Tenn. Code Ann. § 36-113(g)(9)(A) inapplicable to the case. *See* ***In re Adoption of A.M.H.***, No. W2004-01225-COA-R3-PT, 2005 WL 3132353, at *78 (Tenn.Ct. App. W.S., filed November 23, 2005), *rev'd on other grounds*, 215 S.W.3d 793 (Tenn. 2007). Tenn. Code Ann. § 24-7-113 provides, in relevant part, as follows:

> (a) A voluntary acknowledgment of paternity . . . shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment, subject to rescission as provided in subsection (c). The acknowledgment, unless rescinded pursuant to subsection (c), shall be conclusive of that father's paternity without further order of the court.
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> * * *
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> [(b)](3) No judicial or administrative proceedings are required, nor shall any such proceedings be permitted, to ratify an unchallenged acknowledgment of paternity in order to create the conclusive status of the acknowledgment of paternity.
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> * * *
>
> (e)(1) If the voluntary acknowledgment has not been rescinded pursuant to subsection (c), the acknowledgment may only be challenged on the basis of fraud, whether extrinsic or intrinsic, duress, or material mistake of fact.

Tenn. Code Ann. § 24-7-113 (2000). Tenn. Code Ann. § 24-7-113 "establishes a simplified procedure for unmarried fathers to legally establish their paternity without the intervention of the court, by simply executing a voluntary acknowledgment of paternity." ***In re C.A.F.***, 114 S.W.3d 524, 528 (Tenn. Ct. App. 2003).

We further note that in ***In re Adoption of S.M.F.***, 2004 WL 2804892, at *7 n.7, a panel of this court stated as follows:

> [A] legal parent is also a "man . . . who has signed, pursuant to §§24-7-113, 68-3-203(g), 68-3-302 and 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of another state, territory, or foreign country." Tenn. Code Ann. § 36-1-102(28)(D). The form [the father] filed with the Ohio Putative Father Registry on November 28, 2001 appears to meet these requirements. The form is notarized, and in it, [the father] acknowledged that he was the father of the baby. There is no evidence in the record that he ever attempted to revoke this acknowledgment. . . .

(Original underlining omitted.)

Under the facts of this case, Father filed a notice of intent to claim paternity with DCS on March 24, 2006. He filed a petition to establish paternity on May 18, 2006. Both of these were filed prior to the filing by Adoptive Parents of the petition for termination of Father's parental rights. Thus, the trial court properly considered Father to be the "legal parent" for purposes of the termination of parental rights statutes. The less exacting grounds for termination in Tenn. Code Ann. § 36-113(g)(9) are inapplicable to Father in this matter.

B.

Grounds for termination of parental rights are set forth in Tenn. Code Ann. § 36-1-113(g). The only ground properly alleged in this particular case is abandonment. Tenn. Code Ann. § 36-1-113(g)(1). The statute provides that initiation of the termination of parental rights may be based upon the ground of "abandonment" as further defined at Tenn. Code Ann. § 36-1-102 (2005). Tenn. Code Ann. § 36-1-102 provides as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child; . . .

* * *

> (iii) A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth; . . .

Tenn. Code Ann. § 36-1-102(1)(A) (i) and (iii). The requirement that the failure to visit or support be "willful" is both a statutory and a constitutional requirement. *See* ***In re Swanson***, 2 S.W.3d 180, 188 (Tenn. 1999). Simply proving that a parent did not support a child is not sufficient to carry this burden. ***In re M.J.B.***, 140 S.W.3d at 655. Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. ***Id.*** at 654.

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315 (Tenn. 1987).

The trial court made findings of fact that when Father attempted to provide money for some of the medical expenses, his contributions were rejected because he would not pay in cash. The trial court further found that Mother's guardian was prejudiced against Father because of his racial background and that Father was uneducated with regard to legal matters. The trial court also determined that under the facts of this case that it was not unreasonable to ask for paternity to be established before voluntarily paying support.

While the conduct of a third party does not excuse a biological parent's failure to support or visit unless that conduct either prevents the parent from performing his or her duty or amounts to a significant restraint or interference with the parent's effort to support or develop a relationship with the child, ***In re Adoption of Muir***, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *5 (Tenn. Ct. App. M.S., filed November 25, 2005), under the facts of this case, we agree with the factual findings by the trial court and conclude that Adoptive Parents have not shown that any lack of support by Father or failure to visit was willful.

C.

Adoptive Parents additionally contend that the trial court committed reversible error by failing to rule that placing the child in Father's custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

The applicable legal standards with regard to a custody dispute between a natural parent and a non-parent differ markedly from the applicable standards with regard to a custody dispute between two natural parents. ***Ray v. Ray***, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). "[I]n a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child." ***In re Askew***, 993 S.W.2d 1, 4 (Tenn. 1999) (*quoting* ***Bond v. McKenzie***, 896 S.W.2d 546, 548 (Tenn. 1995)). It is not until after a showing of substantial harm has been made that the court will consider the best interest of the child. ***Id.*** "[D]ue to the constitutional protection afforded biological parents, the [non-parent] has the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the biological parent." ***Hall v. Bookout***, 87 S.W.3d 80, 86 (Tenn. Ct. App. 2002). Courts cannot award custody to a non-parent, a third party, instead of a parent, "unless the third party can demonstrate that the child will be exposed to substantial harm if custody is awarded to the biological parent." ***Ray***, 83 S.W.3d at 732.

The courts have not defined what circumstances constitute "substantial harm" to a child. In ***Ray***, this court noted as follows:

> These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier "substantial" indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray, 83 S.W.3d at 732.

In this case, the burden of proof to make a showing of substantial harm is on Adoptive Parents and it must be proved by clear and convincing evidence. ***Hall***, 87 S.W.3d at 86. Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. ***In re C.W.W.***, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *see* ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 n.3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. ***Wiltcher v. Bradley***, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

Adoptive Parents raise two areas of concern: that the child will be exposed to drug use and to violence.

Custody decisions should not be used to punish parents for past misconduct or to award parents for exemplary behavior. ***Rice v. Rice***, 983 S.W.2d 680, 683 (Tenn. Ct. App. 1998). The courts understand that persons are able to turn their lives around, *see* ***In re Askew***, 993 S.W.2d at

2. Accordingly, custody decisions should focus on the parties' present and anticipated circumstances, ***Hall v. Hall***, No. 01A01-9310-PB-00465, 1995 WL 316255, at *2 (Tenn. Ct. App. M.S., filed May 25, 1995), and on the parties' current fitness to be custodians of children. *See* ***Elder v. Elder***, No. M1998-00935-COA-R3-CV, 2001 WL 1077961, at *2 (Tenn. Ct. App. M.S., filed September 14, 2001).

The courts may and should consider past conduct to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child. However, the consideration of past conduct must be tempered by the realization that the persons competing for custody, like other human beings, have their own virtues and vices. ***Gaskill v. Gaskill***, 936 S.W.2d, 626, 630 (Tenn. Ct. App. 1996). The courts should consider, *inter alia*, the nature and severity of the past conduct in relation to the welfare of the child, when the conduct occurred, and what remedial actions, if any, the parent has taken. ***In re D.J.R.***, No. M2005-02933-COA-R3-JV, 2007 WL 273576, at *6 (Tenn. Ct. App. M.S., filed January 30, 2007).

At the conclusion of the trial in this matter, the court expressed the following findings regarding Father's drug use:

> The court goes on to look at whether under the statute . . . placing custody of the child in the father's legal or physical custody would pose a risk of substantial harm. The father testified that he has been involved with drugs. We're, of course, not aware of any adoption cases which discuss that issue as to when does the father's drug use cause a risk of substantial harm to the physical or psychological welfare of the child. . . . But the proof that I have is that he was on drugs sometime within the last 12 months, according to the lady from Omega Services, and that it could not be narrowed down any further than that.

The court reiterated these findings in its written findings of fact and conclusions of law:

> 17. [Father] testified that he has been involved with drugs.
>
> 18. [Father] was on drugs sometime within the last twelve months, according to testimony from a representative of Omega Services, and the time can't be more narrowly determined.

The evidence of drug use, in this case, does not establish clearly and convincingly that the child would more likely than not have been exposed to a substantial risk of harm in Father's custody. Biological parents are not required to demonstrate that they are perfect before they can be granted custody of their children. ***Ray***, 83 S.W.3d at 734. "While a parent who has a present drug or alcohol abuse problem may be unfit to care for a child, past substance abuse problems do not directly reflect the parent's attitudes, sense of responsibility and dedication toward raising a child." ***Marsh v.***

Sensabaugh, No. W2001-00016-COA-R3-JV, 2001 WL 1176017, at *5 (Tenn. Ct. App. W.S., filed October 1, 2001).

The trial court specifically found that "it has not been shown that [Father] can't parent or that his having custody of the child may pose a risk of harm to him." DCS had presented findings to the juvenile court that Father did not pose of risk of harm to the child. According, Adoptive Parents failed to carry the burden of proof with respect to the claims of drug abuse by Father that would expose the child to a substantial risk of harm.

We further conclude that the evidence of domestic violence in the record fails to satisfy the clear and convincing evidentiary standard that the child would more likely than not have been exposed to a substantial risk of harm in Father's custody. Accordingly, Adoptive Parents failed to carry the burden of proof with respect to the claims of domestic violence.

V.

The record before us does not satisfy the clear and convincing evidentiary standard necessary to establish that the child, if left in Father's care at the time of the hearing, would more likely than not have been exposed to a substantial risk of harm. Additionally, no grounds for termination of Father's parental rights were established. Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, A.L.M. and R.L.M. This case is remanded to the trial court for enforcement of the court's judgment and collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE